

Coherence Between EU Competition Law and Data Protection Law: The Value of ‘Epistemic Welfare’ in the Online Information Market

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Abstract

Over the past years, the information marketplace in Europe and beyond has undergone major transformations. Two key shifts that the article analyses is the rise of data-driven targeted online advertising and ‘platformisation’ of news distribution. Although beneficial in many respects, these changes have disrupted the functioning of the information market in ways that might cause harm to trustworthy news publishers and individuals, and disrupt the functioning of democratic systems. Focusing on the value of *epistemic welfare* – the notion that refers to individuals’ ‘right to know’ and to receive trustworthy, independent and varied information – the article analyses competition and data protection concerns arising in the information market. It also provides suggestions on how to coherently enforce the two areas of law in order to promote epistemic welfare of individuals.

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1. Introduction

1.1. The online information market

The media are a highly impactful institution in any democratic system¹ and a core knowledge infrastructure that enhances citizens' political agency. Participatory and deliberative democracy that values critical reflection and active engagement in the public discourse cannot flourish without a well-functioning information environment. As suggested by Helberger, “[o]nly when citizens are aware of the different perspectives, interests and concerns in a society and are able to tolerate and even further them, is political participation deserving of the name”.² Over the past years, the news marketplace in Europe and beyond has undergone major transformations by transitioning to the ad-supported digital environment and allowing the emergence of platform-mediated channels of news distribution and participation mechanisms. Although beneficial in many respects, these changes have also disrupted the functioning of the information marketplace in ways that might cause harm to individuals.

The first main development affecting the information market is the reliance on data-driven online advertising revenue models – in particular online behavioural advertising (‘OBA’) – that currently supports the majority of online content in Europe and beyond.³ Online advertising made free online services possible and is a core enabler of the Internet as we know it. Yet, market participants that seem to benefit most from this model are not publishers offering quality news services, but rather tech platforms such as Facebook, Google, and increasingly Amazon, diverting traffic away from news publishers and negatively impacting their digital ad revenue growth. This results mainly from online platforms’ ability to collect unprecedented amounts of personal data and to create on this basis granular personal profiles of individuals, which in turn attract advertisers and increase the value of the ‘ad click’.⁴ This model risks creating an environment where the overriding incentive is to hold readers’ attention and strengthen engagement to the detriment of the quality of the content that one is supposed to engage with. As many publishers seek scale in order to generate profits, there is a real risk of a race towards trivial journalism that crowds out more considered work. Dominated by a couple of dominant online platforms, the end-to-end advertising delivery process generates also privacy concerns as it is based on the processing of unprecedented amounts of personal data, including sensitive information such as political preferences, health, or religion. In addition, the opacity and complexity of the ad delivery supply chain, which besides powerful platforms

¹ Balkin, J., “Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation”, 51 *UC Davis Law Review* (2018) 1149-1210, at 1210.

² Helberger, N., “On the Democratic Role of News Recommenders”, 7(8) *Digital Journalism* (2019), 993-1012, at 1002.

³ The market for online advertising has grown exponentially over past years, with an estimated global turnover amounting to \$237 billion in 2018. Jounce Media, “A Bottoms-Up Sizing of Digital Ad Spend” (18 July 2018), <<https://jouncemedia.com/blog/2018/7/18/a-bottoms-up-sizing-of-digital-ad-spend>>. IAB’s report indicates that advertising revenues in the US have reached \$88 billion in 2017, with a growth rate of 21,4% relative to 2016: IAB, “Annual Report 2018”, <<https://www.iab.com/iab-annual-report-2018/>>.

⁴ The Cairncross Review, “A Sustainable Future for Journalism” (2019).

consists of multiple smaller ‘middle-men’, makes it complex to fully uncover the economics of online advertising and potentially distortive practices.⁵

The second characteristic that might trigger concerns is the fact that the distribution of information no longer falls solely within the remit of traditional news publishers, but is rather one of the core functionalities of tech platforms that aggregate, curate, and distribute news produced by media outlets or by other, oftentimes less credible sources. Reuter’s “Digital News Report 2018” indicated that 65% of online users access news indirectly – through search engines, social media, email, mobile alerts or news aggregators – rather than by going directly to a news website or application.⁶ This has implications for traditional publishers who have limited control over how the news are curated and prioritised, as well as on citizens who are exposed to algorithmically-selected personalised narratives or poor quality content. The latter category includes orchestrated disinformation campaigns that new information channels make uniquely lucrative. Online platforms, in particular Google and Facebook, have dominated the public sphere by becoming *de facto* news curators as well as “the architecture for publishing new speech and the architects of the institutional design that governs it”.⁷

These cumulative structural and behavioural characteristics result from and at the same time reinforce the power of a handful of tech platforms over the creation and circulation of information online,⁸ which is not a commodity like any other, but rather a broader social good.⁹ Hence, the abuse of power in the information market might affect not only the economics of the online market and users’ privacy, but has also other alarming implications, such fuelling divisiveness and political polarisation, eroding social solidarity and weakening citizens’ political agency.¹⁰

1.2. Focus on the value of epistemic welfare

In the online information marketplace, market power and personal data are inherently intertwined: powerful tech companies with access to personal information might abuse that

⁵ Ad Exchanger, “Programmatic: Break It Down To Build It Back Up” (2019), <<https://adexchanger.com/data-driven-thinking/programmatic-break-it-down-to-build-it-back-up/>>.

⁶ Reuters Institute, “Digital News Report 2018”, at 13.

⁷ Klonick, K., “The New Governors: The People, Rules, and Processes Governing Online Speech”, 131 *Harvard Law Review* (2018) 1598-1670, at 1603-1604.

⁸ Aware of their power over information circulation, some tech platforms put forward initiatives aimed at working closely with the media industry. In March 2018, for example, Google has launched the ‘Google News Initiative’ focused on a three-fold objective of elevating and strengthening quality journalism, evolving business models to drive sustainable growth and empowering news organisations through technological innovation, committing \$300 million toward meeting these goals: Google, “The Google News Initiative: Building a stronger future for news” (20 March 2018), <<https://www.blog.google/outreach-initiatives/google-news-initiative/announcing-google-news-initiative/>>.

⁹ Hubbard, S., “The Decline of American Journalism Is an Antitrust Problem”, *ProMarket* (14 June 2019), <<https://promarket.org/the-decline-of-american-journalism-is-an-antitrust-problem/>>.

¹⁰ Such pervasiveness of power goes together with Foucault’s theoretical accounts of power relationships: “[p]ower applies itself to immediate everyday life which categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to recognize in him. It is a form of power which makes individuals subjects.” See Foucault, M., “The Subject and Power”, 8(4) *Critical Inquiry* (1982) 777-795.

power to exclude or exploit news publishers and ultimately harm individual users.¹¹ Thus, the article aims to verify the assumption that competition and data protection law can offer common legal approaches to the problematic practices arising in the information marketplace.

The article analyses coherence between EU competition and data protection law through the value of individuals' epistemic welfare.¹² The term 'epistemology' is derived from the Greek words 'epistēmē', which can be translated as 'knowledge' or 'understanding', and 'logos', which means 'reason'.¹³ In philosophy, epistemology commonly refers to the theory of knowledge. In this article, epistemic welfare is used as a concept directly related to individuals' 'right to know' and receive trustworthy, independent and varied information. This dimension of individuals' welfare deserves a special focus given the current commonly acknowledged epistemic crisis in media and public spheres,¹⁴ one dimension of which is online disinformation, which threatens the integrity of democratic processes and undermines civic cultures. In other words, this crisis has to do with the impacts of digital technologies on the ways and circumstances in which citizens obtain information. Although digital technologies empower citizens in many different ways, co-existing harmful phenomena, such as disinformation, assume a different form and magnitude in the evolving digital marketplace.¹⁵ Problematising these "conditions of our knowing", as expressed by Dahlgren, "takes us in the realm of epistemology, and today democracy is facing [...] a growing epistemic crisis",¹⁶ as human agency "remains absolutely dependent on the knowledge process".¹⁷

¹¹ This is not to say, however, that this is the only angle from which one could take aim at exploring the topic: regulating freedom of speech and expression online, for example, is another important lenses that could be adopted to address the subject matter.

¹² Stanford Encyclopedia of Philosophy, <<https://plato.stanford.edu/entries/epistemology/>>.

¹³ *Ibid.*

¹⁴ See, for example, Howard, D.P., *Lie Machines: How to Save Democracy from Troll Armies, Deceitful Robots, Junk News Operations, and Political Operatives* (Yale: Yale University Press, 2020); Levy, D.A.L. and Kleis Nielsen, R. (eds.), *The Changing Business of Journalism and its Implications for Democracy* (Oxford: Reuters Institute for the Study of Journalism, 2010). For a discussion focused on the U.S. context, see Benkler, Y., Faris, R. and Roberts, H., *Network Propaganda: Manipulation, Disinformation, and Radicalisation in American Politics* (New York: Oxford University Press, 2018).

¹⁵ Relatedly, Manovich has coined an interesting concept called 'software epistemology'. According to the author, "[d]igital code, data visualisation, GIS, information retrieval, machine learning techniques, constantly increasing speed of processors and decreasing costs of storage, big data analytics technologies, social media, and other parts of the modern techno-social universe introduce new ways of acquiring knowledge, and in the process redefine what knowledge is": Manovich, L. *Software Takes Command* (New York/London: Bloomsbury Publishing, 2013), at 338.

¹⁶ Dahlgren, P., "Media, Knowledge and Trust: The Deepening Epistemic Crisis of Democracy", 1-2(25) *Journal of the European Institute for Communication and Culture* (2018) 20-27, at 20. As Dahlgren further added, "[t]he problem of knowledge is not just an obscure topic for philosophers, it is of absolute practical import for democratic participation".

¹⁷ *Ibid.*, at 21. See also Bandura, A., "Toward a Psychology of Human Agency", 1(2) *Perspectives on psychological science* (2006) 164-180. See also, Frischmann, B. and Sellinger, E., *Engineering humanity* (Cambridge: Cambridge University Press, 2018). Exercising agency, which in the analogue world translates into the ability of individuals to shape their functioning, is a value that in the digital marketplace is particularly prone to impairment. As Frischmann and Selinger have warned, in the digital domain, individuals are increasingly confronted with *techno-social engineering*, the processes where the compound of technological and social forces impacts the way they think, perceive, and act. The forgoing of human agency may not only have disruptive impacts on how people develop personal skills and abilities, but it may also have negative spill-overs on the choice and quality of offerings

Epistemic well-being is a relevant value in the EU legal system. It can be considered a concept underpinning the right to receive information, which is formally enshrined in Article 10 of the European Convention on Human Rights,¹⁸ as well as in the corresponding Article 11 of the EU Charter of Fundamental Rights. Both provisions state that freedom of expression includes “freedom to hold opinions and *to receive and impart information and ideas*”. In the practice of EU Courts, freedom of information surfaced, for example, as a right that needs to be balanced against the right to privacy and data protection in cases related to de-referencing by search engine operators (*Google LLC v CNIL*¹⁹). As such, freedom to receive information is an inherent part of freedom of expression, a general principle of EU law recognised by the EU Courts.²⁰ It is also closely related to media freedom and pluralism, a principle laid down in Article 11(2) of the EU Charter. In addition, freedom to receive information – closely related to epistemic well-being – can be framed as a principle underpinning democracy, which in turn is one of the core EU’s foundational values enshrined in Article 2 TEU. A well-functioning democracy could not be achieved without informed citizenry, which in turn depends on pluralistic, independent and high quality media landscape.

In this article, the state of the online information market serves as a proxy for evaluating epistemic welfare of individuals. The operational premise is that in a well-functioning media market, where citizens can access diverse and high quality news, and where no one actor functions as an opinion-making power, welfare in the epistemic sense is expected to increase. ‘Media contingencies’ and ‘media logics’, as scholars claim, have implications for “the relationship between knowledge and its users, and for how information can be accessed and utilised, and how knowledge can be generated”.²¹ It is thus essential that any significant power over the information market that contributes to epistemic fracturing is scrutinised and limited, if necessary.

1.3. Structure of the article

The article is structured as follows. Section 2 provides a descriptive account of the main structural and behavioural characteristics of the digital information marketplace that may call for a more interventionist legal. It first delves into the online advertising ecosystem, explaining its mechanisms and ways in which changing patterns of news consumption and resulting shifts towards the new model of online content monetisation impact the competitive landscape and media quality. Subsequently, it expands on the trend of ‘platformisation’ of news distribution and what this might mean for traditional publishers and trustworthy information sources more generally. Section 3 discusses the power of online platforms that shape the information market,

in the digital marketplace, including information outlets and varieties in the digital marketplace of ideas. Impaired capacity of reflection and analytical thinking, disengagement and alienation, or decreased motivation to pursue knowledge, are few examples of losing agency that may particularly affect a constructive democratic deliberation.

¹⁸ For an extensive discussion on what obligations the fundamental right to receive news implies for the state regarding news personalisation, see Eskens, S., Helberger, N. and Moeller, J., “Challenged by news personalisation: five perspectives on the right to receive information”, 9(2) *Journal of Media Law* (2017) 259-284.

¹⁹ Case C-507/17, *Google LLC v Commission nationale de l’informatique et des libertes (CNIL)*, EU:C:2019:772.

²⁰ See, for example, Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda*, EU:C:1991:323 - concerned with balancing between the freedom of expression and the freedom to provide services.

²¹ Dahlgren, P., “Media, Knowledge and Trust: The Deepening Epistemic Crisis of Democracy”, 1-2(25) *Journal of the European Institute for Communication and Culture* (2018) 20-27, at 21.

arguing that more public intervention to address power abuses might be necessary. Section 4 explains how market distortions identified in the exploratory section 2 can be addressed through competition and data protection enforcement. Section 5 concludes that the two areas cohere as they *implicitly* pursue the value of epistemic welfare and are able to address problematic practices in a unified and mutually reinforcing manner.

2. Structural and behavioural characteristics of the online information market

2.1. The rise of online advertising

2.1.1. Tracking, targeting, and real-time-bidding (RTB)

Online has become the most common way of news consumption, leading to a partial displacement of newspapers' print circulation.²² As audiences' reading habits have shifted and revenues from print publications decreased, publishers had to adapt their distribution channels and find ways to monetise online content at scale. Several news publishers – mostly global brands at the quality end of the market, such as The New York Times, Wall Street Journal, or Financial Times – are succeeding in financing themselves through online subscriptions, paywall strategies, or membership schemes.²³ The majority of publishers operating online, however, pursue digital advertising revenues in order to offer their content free of charge, making it a critical element of their online business model.²⁴ In the Digital News Report 2019, the Reuters Institute indicated that based on collected data, paywalls, membership schemes or digital subscriptions have not yet had a substantial impact. Although there is a slight increase in online payment in some countries, it noted that little change has been observed in the last six years as “most people are not prepared to pay for online news today and on current trend look unlikely to pay in the future, at least for the kind of news they currently access for free”.²⁵

The economic structures behind the advertising model have changed considerably over the past years, shifting from pre-negotiated contracts between publishers and advertisers to the rapid growth of online advertising that is based on tracking individuals. The online behavioural advertising, which can be defined as “the practice of monitoring people’s online behaviour and using the collected information to show people individually targeted advertisements”,²⁶ is one of the most significant ways of reaching targeted audiences. This development, as observed by Tambini, “is not something that is happening at the margins: it is a massive structural change

²² The Cairncross Review, “A Sustainable Future for Journalism” (2019).

²³ Reuters, “Financial Times reaches a million paying readers” (1 April 2019), <<https://www.reuters.com/article/us-nikkei-ft-readers/financial-times-reaches-a-million-paying-readers-idUSKCN1RD1TF.>>

²⁴ Reuters Institute, “Digital news report 2019”, at 26.

²⁵ Reuters Institute, at 10.

²⁶ Boerman, S.C., Kruikemeier, S. and Borgesius, F., “Online Behavioural Advertising: A Literature Review and Research Agenda”, 46(3) *Journal of Advertising* (2017) 363-376, at 364.

transforming media systems everywhere”.²⁷ In 2016, online ad spending surpassed that on television, which, as commentators observed, reflects the “the gold rush into ad-tech”.²⁸

As online ad spend is increasing unprecedentedly, there is also a sharp rise in the automatic placement of ads. In Europe, programmatic advertising is the main transaction mechanism for online display ads transactions (50.1% of European digital ad spent in 2017).²⁹

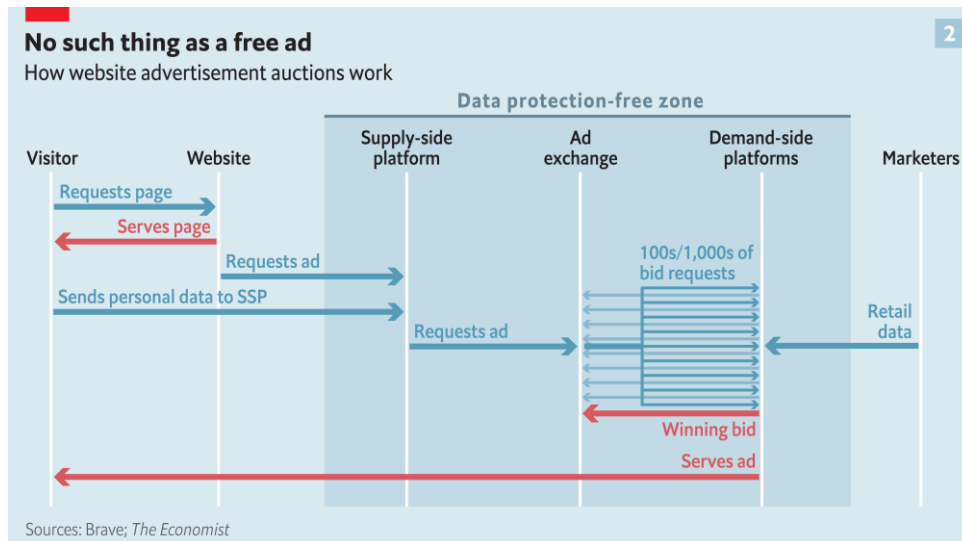


Figure 1: Real-time bidding (RTB)

The currently employed model of automated targeted advertising (programmatic advertising) is a complex and opaque system powered largely by auction-based methods such as RTB (see Figure 1), an online auction process that allows real-time buying and selling of online ad impressions.³⁰ Personal data is the bedrock of this model. When the Internet user loads a website page that relies on ad auctions, their personal data is broadcast to numerous companies in order to solicit bids for the opportunity to show an ad. This ‘RTB bid request’ is conducted on behalf of websites by companies known as ‘supply side platforms’ (‘SSPs’) that create personal profiles and pass them on to ‘ad exchanges’, digital marketplaces that facilitate the buying and selling of advertising space. The data from the supply side is subsequently used by bidders to decide whether the user is likely to click on the ad, and the highest bidder gets to display that ad on the website visited by the user. Thus, the major part of the online publishing industry operates by selling the user’s attention to the highest ad bidder. The speed and scale of programmatic advertising is staggering: it is estimated that each bidding process takes place “in

²⁷ Tambini, D., “How advertising fuels fake news”, *LSE Media Policy Project Blog* (24 February 2017), <<https://blogs.lse.ac.uk/mediapolicyproject/2017/02/24/how-advertising-fuels-fake-news/>>.

²⁸ Global Disinformation Index, “Cutting the Funding of Disinformation: The Ad-Tech Solution” (2019), at 9.

²⁹ European Audiovisual Observatory, “The EU Online Advertising Market – Update 2017”, at 31.

³⁰ In line with IAB definition, “Programmatic trading is the use of automated systems and processes to buy and sell inventory. This includes, but is not limited to, trading that uses real time bidding auctions”: IAB UK, “The Programmatic Handbook”, <<https://www.iabuk.com/sites/default/files/The%20Programmatic%20Handbook.pdf>>.

a timeframe of about 150 milliseconds, whilst the web page loads”.³¹ As ad impressions are sold in separate auctions that involve numerous bidders, “it is likely that over billion bids are made daily and billions of user data points flow through the programmatic system”.³² Furthermore, the value chain consisting of multiple ‘middleman’ – data management platforms, demand-site platforms, ad exchanges and supply-side platforms – is opaque and many ad transactions are not visible to buy-side and sell-side participants.³³

2.1.2. Impacts of online advertising on the information media landscape

The impacts of online advertising on the information media environment is manifold: from incentivising click-bait journalism to supporting the spread of disinformation to incentivising horizontal competition between online platforms and news publishers, leading to a drop in ad revenues for the latter.

Although the stated advantage of moving to online automated personalised advertising mechanisms is to efficiently provide the viewer with the most relevant ad, what the system incentivises is distribution of any content that is sharable. This stands in contrast to the previous ad model that tended to support news that go through the process of verification or meet certain quality standards. The essential market development is that ads are increasingly paired with targeted audiences rather than content, marking a shift from contextual advertising to behavioural advertising, making the economics of creating valuable content and getting associated with it shrunk considerably.³⁴ Anderson and Jullien observed that “the value to a particular advertiser from reaching a consumer is usually assumed independent of the specific platform via which she is reached.”³⁵ Competition in providing online content is nowadays governed by the tastes of advertisers, and as a consequence, consumer sovereignty is affected: “the consumer preferences are not counted directly, but rather it is the preferences of the advertisers that count”.³⁶ As a result, in the digital advertising environment, companies pay for views and clicks rather than news, which might benefit unworthy and unreliable publishers.³⁷ The Global Disinformation Index conducted a study on the funding of disinformation, indicating that “[t]he ad-tech system is currently supplying oxygen – and money – to domains that disinform”.³⁸ This is “happening inadvertently through online adverts being placed on domains that disinform, which is providing these domains with funding and a platform to amplify their messages”.³⁹ Disinformation websites are also more likely to capture ad revenues

³¹ Adshead, S., et al., “Online Advertising in the UK. A report commissioned by the Department for Digital, Culture, Media and Sport”, *Plum* (2019).

³² *Ibid.*

³³ *Ibid.*, at 45.

³⁴ New York Times, “Where Clicks Reign, Audience Is King” (2015) <<https://www.nytimes.com/2015/08/17/business/where-clicks-reign-audience-is-king.html? r=0>>.

³⁵ Anderson, S.P. and Jullien, B., “The Advertising-Financed Business Model in Two-Sided Media Markets” in Anderson, S.P, Waldfogel, J. and Strömberg, D. (eds.), *Handbook of Media Economics* (Noth Holland: Elsevier, 2016, Vol 1A), at 46.

³⁶ Anderson, S.P. and Waldfogel, J., “Preference Externalities in Media Markets” in Anderson, Waldfogel and Strömberg, *ibod.*, at 13.

³⁷ Tambini, D., “How advertising fuels fake news”, *LSE Media Policy Project Blog* (24 February 2017), <<https://blogs.lse.ac.uk/mediapolicyproject/2017/02/24/how-advertising-fuels-fake-news/>>.

³⁸ Global Disinformation Index, “Cutting the Funding of Disinformation: The Ad-Tech Solution” (2019), at 5.

³⁹ *Ibid.*, at 5.

due to their focus on negative emotions as well as being unconstrained by trustworthiness.⁴⁰ This comes inevitably with reputational costs for advertised brands, who might not be fully aware of the process.

The need to maximise appeal to advertisers is therefore at the bottom of clickbait practices, driving the infusion of sensationalism – in terms of both content and headlines – in order to encourage higher numbers of clicks.⁴¹ In a study on newsrooms in the US and France, Christin found that “the popularity of online articles (clicks, unique visitors, likes, tweets, etc.) has become an important yardstick of performance and value in most web newsrooms”.⁴² She observed that at several sites, there is a clear correlation between revenue and traffic: writers are ‘paid by click’ based on the advertising revenues brought by their articles and might receive substantial bonuses when their articles are widely shared on social media, for example.⁴³ And as others observed, “content that instantly engages most effectively is content that generates outrage, not necessarily content that is truthful or thoughtful”.⁴⁴ Algorithmically enabled amplification of selected narratives and focusing on the viral at the expense of the substantive risks becoming commonplace in the environment focused on engagement.

Importantly, the shift to automated personalised ad targeting resulted in the loss of ad revenues for publishers.

2.3. ‘Platformisation’ of news distribution

2.3.1. Traffic referral, traffic allocation, and personalisation of news

Over the past few years, news distribution and consumption have become multi-channelled. As platforms such as social networks, news aggregators and search engines are essential ways to access news, publishers use them as alternative channels to reach readers.⁴⁵ Simultaneously, the content produced by publishers is the *sine qua non* for digital platforms’ existence, resulting in their vertical interdependence.⁴⁶ As indicated in the submission to the Digital Platform Inquiry by the Australian Competition & Consumer Commission (‘ACCC’), “the viability of the platforms depends of the viability of the suppliers of content, including both news content and user-generated content.”⁴⁷

Beyond benefitting online platforms only, this vertical relationship could also be assumed to be advantageous to news publishers, as platforms should in theory generate for them

⁴⁰ *Ibid.*, at 15.

⁴¹ Kavanagh, J. and Rich, M.D., *Truth Decay: An Initial Exploration of the Diminishing Role of Facts and Analysis in American Public Life* (Santa Monica: Rand Corporation, 2018), at 97.

⁴² Christin, A., “Web analytics in the workplace: What Amazon and web newsrooms have in common – and where they differ”, *LSE Impact Blog* (9 October 2015), <<https://blogs.lse.ac.uk/impactofsocialsciences/2015/10/09/what-amazon-and-web-newsrooms-have-in-common-and-where-they-differ/>>.

⁴³ *Ibid.*

⁴⁴ Scott Morton, F. at al., Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee, *Stigler Center for the Study of the Economy and the State, Chicago Booth* (2019), at 40.

⁴⁵ De Corniere, A. and Sarvary, M., “Social Media and the News Industry”, *NET Institute Working Paper No. 17-07* (2017).

⁴⁶ Geradin, D., “Complements and/or substitutes? The competitive dynamics between news publishers and digital platforms and what it means for competition policy”, *TILEC Discussion Paper No. 2019-003* (2019), at 7.

⁴⁷ Ergas, H. et al., “Impact of news aggregators on public interest journalism in Australia” (May 2018), at 37.

valuable traffic. Yet, what can be observed instead is a bargaining power imbalance between platforms and publishers, which often implies that the former free-ride and commoditise the creative content produced by the latter, likely resulting in its devaluing.⁴⁸ Such power asymmetries when it comes to news distribution exist not only between local publishers and platforms.

Among examples of free-riding practices that had the effect of diverting traffic away from news publishers and locking users into platforms' environments is Google's tool called Accelerated Mobile Pages (AMP).⁴⁹ Although the stated objective of improving the user experience of the Web by ensuring mobile web pages' faster loading times might benefit consumers, the way the Google-controlled tool operates takes profits away from publishers and benefits predominantly the tech giant. Publishers are forced to create AMP versions of news articles as only content that 'opts in' to AMP can be positioned as premium at the top of search results. Furthermore, as AMP pages are loaded on and served from Google servers, readers are kept in the Google's environment. Google also assumes full control over content monetisation by restricting online advertising that can be displayed on mobile websites via AMP, thereby limiting publishers' revenues. Commenting on the tool, Benton said that "[w]e are moving now from a world where you can put anything on your website to one where you can't because Google says so".⁵⁰

Additionally, as platformisation of news distribution is on the rise, tech companies perform increasingly the role of managers of communication that "enable, direct and channel specific flows of information" and decide what content is meaningful and should feature more prominently on different user interfaces.⁵¹ This could result from platforms' attempts to personalise users' information environments or simply maximise engagement of website users. As algorithms remain largely undisclosed by companies, how exactly platforms select and curate news and why certain sources feature more prominently is difficult to establish.

By embarking on news administration, platforms perform a function that is traditionally assigned to news publishers or broadcasters, such as selecting and curating content, evaluating, ranking and arranging it.⁵² As half of external referral traffic is reportedly done via Google, the company alone is according to some "perhaps the most powerful mediator of online attention to news".⁵³ For news publishers, this is synonymous with losing the ability to maintain their brand by curating the news themselves, which might negatively impact their incentives to invest

⁴⁸ Geradin, D., "Complements and/or substitutes? The competitive dynamics between news publishers and digital platforms and what it means for competition policy", *TILEC Discussion Paper No. 2019-003* (2019), at 13.

⁴⁹ Google, "Understand how AMP looks in search results", <<https://developers.google.com/search/docs/guides/about-amp>>.

⁵⁰ Politico, "Google's mobile web dominance raises competition eyebrows" (6 January 2018), <<https://www.politico.eu/article/google-amp-accelerated-mobile-pages-competition-antitrust-margrethe-vestager-mobile-android/>>. Web developers and leaders published a letter outlining concerns about the Google AMP project: "A letter about Google AMP", <<http://ampletter.org>>.

⁵¹ Langlois, G., "Participatory Culture and the New Governance of Communication: The Paradox of Participatory Media", 14(2) *Television and New Media* (2013) 91-105, at 100.

⁵² Australian Competition & Consumer Commission, "Digital platforms inquiry – Preliminary report" (2018), at 126.

⁵³ Diakopoulos, N., "Audit suggests Google favors a small number of major outlets", *Columbia Journalism Review* (2019), <https://www.cjr.org/tow_center/google-news-algorithm.php>.

in high quality reporting.⁵⁴ The ACCC study indicated that there is “a risk that digital platforms may potentially reduce incentives to invest in original content as a result of key algorithms failing to rank original content higher than re-purposed or effectively duplicated content”.⁵⁵ Also the recent audit study of the ‘Top Stories’ box on Google search showed that 83.5% of articles are less than 24 hours old, meaning that the curation algorithms prioritise fresh copies of news articles rather than the original content.⁵⁶ It also demonstrated that there is a high degree of concentration of attention to a limited slice of news sources, affecting traffic and advertising revenues for the sources that Google does not display.⁵⁷

Other digital intermediaries such as social networking platforms assume an even more important role as they do not merely distribute the content, but also determine the entire architecture in which individuals engage with the news, including the ability to ‘like’ or comment.⁵⁸ Companies such as Facebook “organise not just a single element of communication, but the entire process of political persuasion, [...] understood as the content, space or platform to speak and deliberate about politics, as well as the network of people to speak to”.⁵⁹ Arguably, this makes them “social editors” or “data-driven, social forms of opinion power” that have so far been largely neglected in traditional media policies.⁶⁰

2.4. Impacts on epistemic welfare of individuals

The changes in the online information marketplace contribute to the rise of an untrustworthy media landscape, where quality publishers have limited opportunities to thrive. Recently, the debate focused mostly on one repercussion, namely the phenomenon of disinformation, which can be defined as false or pseudo-information “purposefully conveyed to mislead the receiver into believing that this is information”.⁶¹ According to the EU High Level Expert Group,

⁵⁴ Athey, S., Mobius, M.M. and Pál, J., “The Impact of Aggregators on Internet News Consumption”, *Stanford University Graduate School of Business Research Paper No. 17-8* (2017).

⁵⁵ Australian Competition & Consumer Commission, at 273.

⁵⁶ Diakopoulos, N., “Audit suggests Google favors a small number of major outlets”, *Columbia Journalism Review* (2019), <https://www.cjr.org/tow_center/google-news-algorithm.php>.

⁵⁷ *Ibid.* Top 20% of sources account for 86% of article impressions and the top three – CNN, The New York Times, and The Washington Post – account for 23% of impressions.

⁵⁸ Helberger, N., “Facebook is a new breed of editor: social editor”, *LSE Media Policy Project Blog* (15 September 2016), <<https://blogs.lse.ac.uk/mediapolicyproject/2016/09/15/facebook-is-a-new-breed-of-editor-a-social-editor/>>.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* Although this dimension is outside the scope of this article, it is noteworthy that the information ecosystem has also new content creators: the users themselves. The media governance that has traditionally been the domain of two actors, namely the government and the professional industry, evolved into a marketplace where media audiences take a role of active content creators as opposed to passive recipients only. User-generated content such as personal post or pictures on the one hand, and news produced by traditional media sources on the other one, are now presented side-by-side. While fostering the ‘civic media’ spaces that facilitate participation and engagement, the new layer of content producers capable of instantly delivering and spreading alternative narratives might also, in the worst case, normalise false beliefs and undermine trust in top-down traditional media institutions. See Crawford, K. and Lumby, C., “Networks of Governance: Users, Platforms, and the Challenges of Networked Media Regulation”, 1(3) *International Journal of Technology Policy and Law* (2013) 270-282; Syed, N., “Real Talk About Fake News: Towards a Better Theory for Platform Governance”, 127 *Yale Law Journal Forum* (2017).

⁶¹ This is in line with the assertion that representational content can only be classified as information if it is true. Others claim, however, that disinformation is a type of *information*, that is, something that has a representational

disinformation “includes all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit”.⁶² Thus, in an epistemic sense, the purpose of disinformation is to cause someone to be worse off than she could have been.⁶³ The magnitude of the problem relates also to how disinformation spreads across platforms: for example, a study investigating the diffusion of all the verified true and false stories available on Twitter between 2006 and 2017 has shown that falsehood “diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information”.⁶⁴ In a wider sense, disinformation implies distortions in the news ecosystem to “promote ideologies, confuse, sow discontent and create polarization”.⁶⁵ To encapsulate this broader problem and offer a common language to discuss it, Kavanagh and Rich coined the concept ‘Truth Decay’, which refers to a set of four related trends, namely “increasing disagreement about facts and analytical interpretation of facts and data”, “a blurring of the line between opinion and fact”, “the increasing volume, and resulting influence, of opinion and personal experience over facts”, and “declining trust in formerly respected sources of factual information”.⁶⁶

3. Legal interventions in the online information market: the challenge

The question whether legal interventions are justified and desirable to correct potentially dysfunctional information markets that feature powerful players is not new as such. Welfare of citizens in the epistemic sense has long been associated with an almost fully unrestricted circulation of information and the ability to freely express all types of ideas. “Let [truth] and falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?”, John Milton famously noted in his speech *Areopagitica* in 1644 to express his discontent for English licensing laws.⁶⁷ This thought has subsequently unfolded in an extended form, as ‘the marketplace of ideas’ analogy rooted in laissez faire economics, to build the case supporting free speech and circulation of information, which in turn was expected to advance the quality of a democratic government. The image of ideas that should get a chance to fight it out in the marketplace translates into the assumption that individuals are epistemically better off only if

content. See for example Fallis, D., “The Varieties of Disinformation” in Floridi, L. and Illari, P. (eds.), *The Philosophy of Information Quality* (Switzerland: Springer International, 2014), at 137.

⁶² EU High Level Expert Group on Fake News and Online Disinformation, “A multi-dimensional approach to disinformation” (2018).

⁶³ See Chisholm, R.M. and Feehan, T.D., “The intent to deceive”, 74(3) *Journal of Philosophy* (1977) 143-159. See also Hancock, J.T., “Digital Deception: Why, When and How People Lie Online” in Joinson, A.N. et al. (eds.), *Oxford Handbook of Internet Psychology* (Oxford: Oxford University Press, 2012). Digital deception may be further typified as ‘message-based digital deception’, arising when information exchanged by two or more interlocutors is manipulated or controlled to be deceptive, and ‘identity-based digital deception’, referring to deceit related to the false manipulation or display of a person or organization’s identity (e.g. creating fake online accounts).

⁶⁴ Vosoughi, S., Roy, D. and Aral, S., “The spread of true and false news online”, 359(6380) *Science* (2018) 1146-1151, at 1147.

⁶⁵ European Commission, Joint Research Center, “The digital transformation of news media and the rise of disinformation and fake news” (2018).

⁶⁶ Kavanagh and Rich.

⁶⁷ Milton, J., “*Areopagitica*”, *Speech* (1644).

competition among the circulating information is not inhibited by any type of public policy or legal intervention. In line with this belief, more and unrestricted speech should be corrective to bad speech, such as disinformation or poor quality information.⁶⁸ As put by Schauer, “just as Adam Smith’s ‘invisible hand’ will ensure that the best products emerge from free competition, so too will an invisible hand ensure that the best ideas emerge when all opinions are permitted freely to compete”.⁶⁹ Also Posner supported this ‘Darwinian test’ for information, expressing approval for its ability to generate better results as compared to a centrally managed economy in thought.⁷⁰ In the American jurisprudence, it was Justice Holmes who first relied on the concept in his 1919 dissent to *Abrams v. United States*, where he maintained that “the best test of truth is the power of thought to get itself accepted in the competition of the market”.⁷¹ It subsequently became one of the most important governing analogies in the context of First Amendment Law and free expression in the U.S.⁷²

Although public intervention resulting in creating ‘ministries of truth’ is far from desirable, in the modern online media marketplace where clickbait journalism crowds out quality reporting and large-scale disinformation campaigns become the new normal, defending free and unregulated knowledge marketplace is difficult to justify. Just like in the economic context, the information marketplace can be flawed and might need to be corrected through policy measures. Coase suggested already in 1974 that the approach “which has commended itself to economists for the market for goods” needs to be replicated in the information marketplace, as the case for government intervention in the latter might turn out even stronger than in the former.⁷³ He then expressed that if anyone who propagated some ideas “received the value of the good [they] produced or had to pay compensation for the harm that resulted, it is easy to see that in practice there is likely to be a good deal of “market failure””.⁷⁴ This might prove even more true in digital markets, where harms resulting from the diffusion of poor quality information are magnified due to speed and scale.

Deeply ingrained in the idea of truth discovery through a free and unrestricted information market is the assumption that “the public has access to the whole information output and that there is a rational and informed process for selecting the truth”.⁷⁵ The trends outlined in section 2 demonstrate, however, that the current structure of the online environment and practices therein might prevent the model of an informed deliberation and a reliable information regime from unfolding. As suggested earlier, potential failures in this ecosystem can be linked to the rise of platform power that empowers few to speak at scale and drown out

⁶⁸ See US Supreme Court, *Whitney v California*, 274 U.S. 357 (1927). In his concurrence, Justice Louis Brandeis argued that “(t)he remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression”.

⁶⁹ Schauer, F., *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), at 161.

⁷⁰ Posner, R., *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), at 115.

⁷¹ U.S. Supreme Court, *Abrams v. United States*, 250 U.S. 616 (1919).

⁷² Waldman, A.E. “The Marketplace of Fake News”, 20(4) *Journal of Constitutional Law* (2018) 845-870, at 847-848.

⁷³ Coase, R., “The Market for Goods and the Market for Ideas”, 64(2) *American Economic Review* (1974) 384-391, at 389.

⁷⁴ *Ibid.*

⁷⁵ Lombardi, C., “The Illusion of a ‘Marketplace of Ideas’”, 3(1) *American Affairs* (2019).

many important voices,⁷⁶ including reliable information sources. The premise that poor quality or false information should be allowed to freely circulate in the information marketplace because they will ultimately get tossed aside if allowed to compete on a playing field with truth must also be contested. An epistemic error underlying this argumentation is that false information represents the same type of information as the one that the metaphorical marketplace intends to promote.⁷⁷ It needs to be stressed that protecting information that is to be freely exchanged is not necessarily synonymous with protecting the market of untrue information. As observed by Foucault, giving “equal place to all forms of *parrhesia*” – freedom of speech for everyone – may be dangerous for democracy and is “not sufficient to disclose truth since negative *parrhesia*, ignorant outspokenness, can also result”.⁷⁸

Interventions in the marketplace of ideas might therefore prove justified on the grounds of promoting a trustworthy information regime and making more prominent the voices that augment individuals’ epistemic well-being and informed engagement. The next sections turn to EU competition law and data protection to map out possible legal responses aimed at mitigating the abuse of power in the information market in Europe and boosting individuals’ epistemic welfare.

4. Enforcement of EU competition law and data protection law in the online information market

⁷⁶ Syed, *supra* note 606.

⁷⁷ For an extensive discussion, see Waldman, *supra* note 621, at 847-848.

⁷⁸ Foucault, M., *Fearless Speech*, (MIT Press, 2001), at 73.

Information cycle	Market practice	Competition concerns	Data protection concerns
INFORMATION PRODUCTION	targeted online advertising	<p>data consolidation through ‘market envelopment’ (Article 102 TFEU)</p> <p>refusals to grant access to data (Article 102 TFEU)</p>	<p>legal basis (Article 6 & 7 GDPR)</p> <p>processing of sensitive data (Article 9 GDPR)</p> <p>provision of information (Article 13 & 14 GDPR)</p> <p>profiling and individual automated decision-making (Article 22 GDPR)</p>
INFORMATION DISTRIBUTION	traffic administration & content personalisation	limited or no traffic referrals (Article 102 TFEU)	N/A
		<p>exploiting individuals’ ‘willingness to engage’ (Article 102 TFEU)</p>	<p>legal basis (Article 6 GDPR)</p> <p>purpose limitation (Article 5 GDPR)</p> <p>automated decision-making (Article 22 GDPR)</p>

Fig. 4. Overview of problematic practices in the online information market.

4.1. Information production: targeted online advertising

The transition to online channels and the accompanying shift towards the behavioural targeted advertising model has not painted a bright landscape for news publishers, as the emergence of online platforms has upended the command that more traditional publishers long enjoyed over readers’ attention. As described in section 2, this is caused predominantly by an “almost

limitless scope for advertising placement⁷⁹ in the digital domain: advertising can be hosted not only on a publisher's website, but also on social media platforms (e.g. Facebook or Instagram) or streaming platforms (e.g. YouTube). As advertisers are increasingly interested to target ads based on detailed personal profiles of users rather than on contextual information about the content next to which their ad appears, tech companies that are able to collect detailed consumer data and categorise them into 'audience segments' based on users browsing behaviour, search terms, or placement in a social network, acquire a significant competitive edge over news publishers.⁸⁰ In fact, aggregating attention subsequently monetised by the provision of advertisement is tech platforms' basic *modus operandi*.

The result is the online environment driven by advertising logics and characterised by horizontal data-driven competition between news publishers, websites and tech platforms for securing ad revenues.⁸¹ The sections below focus first on possible competitive distortions in the online advertising marketplace and subsequently on the compatibility of the ad-targeting model with EU data protection law.

4.1.1. Competition and online advertising

Data is an essential element of a business model focused on providing targeted advertisement. Online platforms are undeniably in a better position as compared to publishers to harvest user data from both their proprietary services as well as third-party websites and applications,⁸² gaining a competitive edge. In display advertising, which is the largest segment of online advertising, social media advertising provides the largest share of display advertising revenue. With a market share of around 75-80% in the US and in Europe, Facebook is the leading market player in this segment.⁸³ Video advertising dominated by Google (YouTube) also accounts for a substantial part of display advertising. Facebook and Google are active in the display advertising market sector not only through their platforms, but also as providers of ad intermediation and technology services. Search advertising – the second largest advertising segment worldwide (43.3% in 2019) – is dominated by Google and its service Google Ads both in the US and Europe.⁸⁴

The ad tech market has turned therefore into a Google-Facebook duopoly, extracting a large portion of online advertising (search and display) revenue and growth. As indicated in the 2018 opinion on data processing in the online advertising sector published by the French

⁷⁹ The Cairncross Review, "A Sustainable Future for Journalism" (2019).

⁸⁰ See News Corp, "Comments of News Corp to the European Commission" (2018), at 3.

⁸¹ Geradin, D., "Complements and/or substitutes? The competitive dynamics between news publishers and digital platforms and what it means for competition policy", *TILEC Discussion Paper No. 2019-003* (2019).

⁸² See Autorité de la Concurrence, "Opinion no. 18-A-03 of 6 March 2018 on data processing in the online advertising sector", at 6. As indicated in the opinion of the French Competition Authority, the data collected by Google and Facebook are used to offer various targeting options: contextual targeting, location targeting, interest targeting, retargeting, geolinguistic targeting, sociodemographic targeting, and time targeting". The ability to behaviourally target specific audiences in real-time tends to increase advertisers' willingness to pay to advertisement. See also Chen, J. and Stallaert, J., "An economic analysis of online advertising using behavioural targeting", 38(2) *Management Information Systems Quarterly* (2014).

⁸³ Fourberg N. et al., "Online advertising: the impact of targeted advertising on advertisers, market access and consumer choice" (2021), Publication for the committee on the Internal Market and Consumer Protection, European Parliament, at 17.

⁸⁴ *Ibid.*, at 16.

Competition Authority, “one of [the] clearest findings is the considerable economic weight of two stakeholders, both in absolute volume and growth share: Google and Facebook, which currently generate most of their revenue through the sale of advertising services (90%).”⁸⁵ Thanks largely to its extensive purchasing data, Amazon is on its way to becoming yet another gatekeeper in the online advertising market alongside Google and Facebook.⁸⁶

The power of online platforms in relation to online advertising and potential competitive distortions might have detrimental impacts on news publishers, as online advertising represents a core part of their business, and as a result harm individual’s epistemic welfare. As the UK’s Competition & Markets authority observed, “concerns relating to online platforms funded by digital advertising can lead to wider social, political and cultural harm through the decline of authoritative and reliable news media, the resultant spread of ‘fake news’ and the decline of the local press which is often a significant force in sustaining communities”.⁸⁷

The complexity of the ad ecosystem and potentially anticompetitive strategies of companies to gain or maintain power have already prompted calls for an in-depth inquiry into the market. In the UK, one of the recommendations put forward in the Report of the Digital Competition Expert Panel on “Unlocking digital competition”⁸⁸ (so-called ‘Furman Report’) was to conduct a market-wide inquiry into the online ad sector encompassing the entire value chain in order to foster understanding of the operation of platform markets that rely on online advertising for revenue. Similarly, Brave, a new privacy-friendly browser, has suggested that the European Commission (the Directorate-General for Competition) should conduct a sector inquiry into the digital advertising market in order to verify the existence of potentially anticompetitive practices that disadvantage publishers, restrict innovation, and limit consumer choice.⁸⁹ The UK’s Information Commissioner’s Office also made the ad tech sector a priority and published reports on ad tech and real-time bidding, indicating that it will continue to scrutinise the market.⁹⁰ Similarly, in July 2020 the UK’s Competition & Markets Authority published its market study final report on “Online platforms and digital advertising”⁹¹, where it scrutinises the functioning of the online advertising market and the competitive dynamics.

Focusing on display online advertising, the two following sub-sections analyse online platforms’ practices that affect horizontal competition for ad revenues between online platforms and news publishers. The focus is on market strategies that facilitate data consolidation, as access to data is the bedrock of competition for ad revenues in the online advertising market. The CMA report noted, “the inability for smaller platforms and publishers to access equivalent

⁸⁵ Autorité de la Concurrence, *supra* note 587, at 4. According to the French authority, Google’s and Facebook’s competitive advantages are linked, “to the volume and variety of data, but also indissociably, to the size of the advertising inventories made available to advertisers, and to their audience”, at 7.

⁸⁶ Scott Morton, F., at al., “Committee for the Study of Digital Platforms, Market Structure and Antitrust Subcommittee”, *Stigler Center for the Study of the Economy and the State, Chicago Booth* (2019), at 38.

⁸⁷ CMA, “Online platforms and digital advertising. Market study final report” (1 July 2020), at 9.

⁸⁸ Digital Competition Expert Panel (2019).

⁸⁹ Brave, “Brave requests European Commission antitrust examination of online ad market” (4 December 2018), <<https://brave.com/european-commission-sector-inquiry/>>.

⁹⁰ ICO, “Adtech. Market Research Report” (March 2019); ICO, “Update report into adtech and real time bidding” (20 June 2019); ICO, “Blog: Adtech – the reform of real time bidding has started and will continue” (17 January 2020) <<https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/01/blog-adtech-the-reform-of-real-time-bidding-has-started/>>.

⁹¹ CMA, “Online platforms and digital advertising. Market study final report” (1 July 2020).

user data to Google and Facebook may raise entry barriers, as it reduces the ability for these rivals to compete on a level playing field and realise the full value of their advertising inventory”.⁹² Thus, while section (a) analyses the practice of market envelopment, section (b) focuses on refusals to share data.

a. Data consolidation through ‘market envelopment’

One way for a company to enter an online market with strong network effects and substantial switching costs (characteristics occurring frequently in online markets) is to offer a radically new functionality. To gain a competitive edge over news publishers and other businesses racing for ad revenues, platforms might however embark on other, potentially problematic data-related business strategies. One of them is the expansion to other related or unrelated markets in order to accumulate various types of data and build on this basis detailed profiles of individuals: a practice called ‘platform envelopment’.

As explained in the seminal paper by Eisenmann *et al.*,⁹³ envelopment “entails entry by one platform provider into another’s market by bundling its own platform’s functionality with that of the target’s so as to leverage shared user relationships and common components”.⁹⁴ Envelopers gain market shares by foreclosing an incumbent’s (i.e. an online platform’s) access to users, and by doing so capture the network effects that had earlier protected the incumbent firm.⁹⁵ As mentioned, this entry path is not based on disruptive innovation, but rather on leveraging existing data-related market power. The concept of envelopment differs from established theories of market entry through foreclosure as it refers not only to the practice of bundling complementary products or services, but also of bundling platforms that are weak substitutes or that are functionally unrelated.⁹⁶

As such, an envelopment strategy is an alternative route for businesses to challenge the market position of incumbents, which might otherwise be difficult to do due to strong network effects and other entry barriers. Yet, when employed by powerful platforms to win adjacent or completely new markets, it might lead to even stronger consolidation of their economic power and data. Google, for example, relied on an envelopment strategy to enter different markets by linking new services to its search platform, such as payment services (Google Checkout), productivity software (Google Docs), Web browser software (Chrome), and mobile phone operating systems (Android).⁹⁷ Similarly, Meta entered, among others, the market for dating (Dating) or for classified ads (Marketplace).

As claimed by Eisenmann *et al.*, the benefits following an envelopment attack materialise (a) on the cost side, when there is a meaningful component overlap and significant economies of scope, (b) on the revenue side when there is a large user overlap and significant demand economies of scope (i.e. users are concentrating their purchases on a single supplier),

⁹² CMA, “Online platforms and digital advertising. Market study final report” (1 July 2020), at 255.

⁹³ Eisenmann, T., Parket, G. and Van Alstyne, M., “Platform Envelopment”, 32(12) *Strategic Management Journal* (2011) 1270-1285.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, at 1270.

⁹⁶ *Ibid.*, at 1272.

⁹⁷ *Ibid.*, at 1271.

or (c) when there is a substantial user overlap and the entrant can exploit negative correlations of users' valuations across platforms to more effectively embark on price discrimination.⁹⁸

Besides the three abovementioned conditions (a) to (c), there are alternative ones under which the bundling of weakly related or unrelated platforms might prove profitable. As recently suggested by Condorelli and Padilla, this may occur when a platform operating across many platform markets with a common user side engages in "privacy policy tying", that is "when the (conglomerate) firm's privacy policies in each side of those platform markets request users to grant consent so that it can combine the data they generate when using its multiple platforms to improve its offerings in one or more of them".⁹⁹ Arguably, the objective is to monopolise the unique data produced in the target platform and combine this data with those in the origin platform with the aim of monetising the merged datasets and obtaining an advantage in the origin platform market or to extract more surplus in that market.¹⁰⁰ One example could be Google's entry into the mobile operating systems market, which gave the company the opportunity to combine, among others, users' search histories from Google search and the location data from Android devices to construct superior profiles and enable advertisers to better target consumers.¹⁰¹

Data consolidation – a leverage that platforms can derive from an entry through envelopment – might lead to an exclusion of potential entrants, even as-efficient competitors, in the target market, given their limited ability to take advantage of cross-subsidising or offering similar bundles of products and services in the first place.¹⁰² This is not however the only harm that might materialise following the envelopment attack. Importantly, the practice might also increase barriers on the other side of the market – in the advertising market – where other businesses unable to consolidate data and create consumer super-profiles, such as news publishers, end up lagging behind in the competition for ad revenues. Arguably, such an 'indirect' exclusion of news producers on the advertising side of the market, which is likely to result in their inability to finance their online operations, and ultimately in decreased epistemic welfare of citizens, might be problematic under Article 102(b) TFEU.

The harm theory described above might also be relevant in the context of merger control. If a platform acquires a target firm that constitutes another platform market, and aggregates data from both platforms, there is a tangible risk of foreclosure of businesses that horizontally compete with a dominant platform for ad revenues, such as news publishers.

From a legal and economic standpoint, power leveraging is a complex area, as it does not always have anticompetitive effects leading to consumer harm.¹⁰³ As Rey et al. indicate, "[i]n contrast to the literature on the direct exercise of market power the literature on adjacent markets has reached much less of a consensus as to when and why such indirect exercise of

⁹⁸ *Ibid.*, at 1281.

⁹⁹ Condorelli, D. and Padilla, J., "Harnessing Platform Envelopment through Privacy Policy Tying" (2020), *SSRN*, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504025>, at 4.

¹⁰⁰ *Ibid.*, at 22.

¹⁰¹ *Ibid.*, at 34.

¹⁰² Mohan, M., "Platform mergers: Tips for getting the deal through", *Kluwer Competition Law Blog* (2019), <http://competitionlawblog.kluwercompetitionlaw.com/2019/05/16/platform-mergers-tips-for-getting-the-deal-through/#_ftn1>.

¹⁰³ Crocini, P., "Leveraging of Market Power in Emerging Markets: A Review of Cases, Literature, and a Suggested Framework", 4(2) *Journal of Competition Law & Economics* (2008) 449-534, at 450.

market power is to be feared.”¹⁰⁴ Thus, the legality of envelopment strategies must be scrutinised on a case-by-case basis as they may have both pro-competitive (e.g. facilitated entry in target platform markets, improved services) and anti-competitive effects. In general, there should be rather a rebuttable presumption of legality in envelopment cases¹⁰⁵, as the risk of type I errors (over-enforcement) seems to be greater in such cases than type II errors (under-enforcement) – just like in many tying or bundling cases in one-sided market scenarios. This, among others, is supported by the fact that also firms with insubstantial or no market power can embark on merging datasets and privacy policy tying.¹⁰⁶

Yet, enforcement authorities should remain cautious in cases where tipping is likely in the market and where the envelopment strategy includes coercive tying of privacy policies: forcing users to accept the new policy, which in turn generates no benefits to them and results in no or limited economies of scope.¹⁰⁷ In such cases, and as long as exclusionary effects in the market follow the tying market practices, data protection considerations should become part of competition analysis. Enforcers also need to balance the welfare gains or losses on one market side against such gains or losses on the other, advertising side of the market. Thus, intervention needs to be preceded by a careful consideration of facts and circumstances in which leveraging takes place.

b. Refusals to grant access to data

Once firms have gathered the data essential to gain a competitive advantage, they are naturally incentivised to keep the data for themselves and refuse to provide access for competitors. To remedy anti-competitive practices related to data concentrations, one might argue in favour of affirmative obligations to require dominant companies to share data with competitors, such as news publishers on the advertising market side under Article 102(b) TEFU. Commission’s Vice-President Vestager suggested that if competition enforcers “find that some businesses are using their control of data to deny others a chance to compete, then those companies might have to share the data they hold – in a way that’s fully in line with the data protection rules”.¹⁰⁸ Referring to the competition law doctrine on refusals to supply, some suggested that “the threshold for finding that a refusal to supply data constitutes an abuse may be somewhat lower than the threshold for finding an abuse in cases of a refusal to grant access to infrastructures or to intellectual property rights”.¹⁰⁹ This holds true in particular when a dominant platform has gathered data incidentally and without considerable investments.

Yet, mandating data sharing in the business-to-business context – e.g. between platforms and publishers competing for ad revenues – triggers a number of questions, in particular regarding the conditions and terms on which a mandated access to data should be granted. Drawing insights from the licensing principles that must be Fair, Reasonable and Non-

¹⁰⁴ Rey, P., Seabright, P. and Tirole, J., “The Activities of a Monopoly Firm in Adjacent Markets: Economic Consequences and Implications for Competition Policy”, *IDEI Working Papers 132* (2001).

¹⁰⁵ Condorelli and Padilla, at 37.

¹⁰⁶ *Ibid.*, at 38.

¹⁰⁷ *Ibid.*

¹⁰⁸ Commissioner Vestager, “Privacy and competition in an age of data”, *Speech* (21 November 2019).

¹⁰⁹ Schweitzer, H., Haucap, J., Kerber, W. and Welker, R., “Modernising the law on abuse of market power”, Report for the German Federal Ministry for Economic Affairs and Energy (2018).

Discriminatory ('FRAND' terms), authorities could establish a similar set of conditions applicable to data exchanges. One of the elements to consider while designing such terms would be the principle of reciprocity and what competitors should be required to provide in exchange for access to datasets – issue that has recently surfaced as a tension point under the Payment Services Directive ('PSD2').¹¹⁰ In addition, to avoid the problem of free-riding, data sharing should be accompanied with specific requirements regarding the innovativeness and the value added of the product or service that firms accessing data should be obliged to implement. In the information media market, for example, the added value takes the form of producing sustainable and trustworthy information content. To be effective, cross-firm and cross-industry data exchanges would also require supporting technological infrastructures and standardisation. Furthermore, there is a number of contentious issues that competition authorities would need to address on a case-by-case basis. For example, in case platforms have not obtained the data on the merits or obtained them illegally in the first place (e.g. by violating data protection rules), imposing data sharing obligations is likely to trigger concerns as to the legitimacy of such obligations.

In short, competition law, and in particular Article 102(b) TFEU, could be a mechanism limiting data collection for the purpose of targeted advertising insofar as platforms' market strategies to amass such data distort competition for ad revenues. In certain circumstances, it could also oblige data-rich platforms to share their data with competitors – e.g. publishers – to maintain the competitive process on the advertising market side. The next section turns to the question of how online targeted advertising affects the protection of individuals' data and what legal solutions exist to address potential incompatibilities with the GDPR. Based on this analysis, concluding section 5 discusses how coherent EU competition and data protection are in addressing market dysfunctions related to online advertising.

4.1.2. Data protection and online advertising

In the online advertising market, what attracts advertisers and increases the value of 'the click' is publishers' ability to build detailed profiles of individuals. As described in section 2.1 above, digital advertising – the RTB mechanism in particular – generates incentives to provide "as much data to as many bidders as feasible." Currently existing two main versions of the RTB system – 'OpenRTB' developed by the Interactive Advertising Bureau ('IAB', a trade body for the advertising industry) and used by most significant companies in the online media and ad industry, and 'Authorized Buyers', Google's proprietary system, are illustrative of the level of detail of personal profiles created for targeted advertising purposes. According to these systems, bid requests include a wide variety of personal data ranging from what the user is reading or watching, location information, the user's time zone, the device type, unique tracking IDs and IP addresses to sensitive categories of information such as health conditions, sexual orientation, religious denomination and political opinions – information that can be used for audience targeting.¹¹¹ Research conducted by Privacy International found, for example, that certain

¹¹⁰ Directive 2015/2366 (Payment Services Directive/PSD2) [2015], OJ L337.

¹¹¹ See Information Commissioner's Office, "Update report into adtech and real time bidding" (20 June 2019). As highlighted in the report, the IAB 'content taxonomy' indicates data such as 'Heart and Cardiovascular Diseases', 'Mental Health', 'Sexual Health' and 'Infectious Diseases', while Google's specifications include 'Reproductive Health', 'Substance Abuse', 'Politics' or 'Health Conditions'.

depression test websites use programmatic advertising with RTB, and “risk sharing data relating to health with hundreds of companies in the RTB ecosystem”.¹¹²

In August 2019, the IAB Europe, in partnership with IAB Tech Lab, has introduced a new version of its controversial Transparency and Consent Framework (‘TCF 2.0’), a set of policies which all parties in the digital advertising chain (e.g. publishers, advertisers, technology providers) can voluntarily employ in order to comply with the GDPR when processing personal data and/or accessing and/or storing information on a user’s device.¹¹³ According to the IAB, changes include giving consumers the ability to grant and withhold consent, to exercise their ‘right to object’ to data processing, as well as to ‘gain more control over whether and how vendors may use certain features of data processing’,¹¹⁴ such as geolocation. When it comes to publishers, the new iteration of the TCF centered on giving them more control over how their ad tech vendor partners can use personal data and for what purposes. Reacting to the launch of the TCF 2.0, Google pledged its commitment, stating that it will integrate the Framework by March 2020. Despite the changes introduced in the guidelines, they continue to attract criticism concerning their privacy implications.

In line with Article 2(1) GDPR, the regulation ‘applies to the processing of personal data wholly or partially by automated means’. In so far as the information used in the RTB context enables the identification of natural persons, they constitute personal data that need to be processed in compliance with the GDPR. As described above, bid requests are based on a large number of personal data that are able to identify an individual in a variety of ways. Veale and Borgesius note that ‘[e]ven it requires multiple actors such as publishers, demand-side platforms, ad exchanges and supply-side platforms to do so, data processing in real-time bidding is designed to identify and profile individual users’,¹¹⁵ bringing it into the scope of the GDPR.

The use of personal data for the purpose of digital advertising is currently under scrutiny by privacy advocacy groups and enforcers. For example, simultaneous GDPR complaints against Google and other ad tech firms for how they handle personal data for the purpose of ad targeting have been filed with the Irish Data Protection Commissioner and the UK Commissioner in September 2018¹¹⁶ and with the Polish Data Protection Authority in January 2019.¹¹⁷ Following the complaints, in May 2019, the Irish Data Protection Commission has announced its first statutory inquiry pursuant to section 110 of the Data Protection Act in respect of Google Ireland Limited’s processing of personal data in the context of its online Ad Exchange. The inquiry aims to assess “whether processing of personal data carried out at each

¹¹² Privacy International, “Your mental health for sale. How websites about depression share data with advertisers and leak depression test results” (2019), at 5.

¹¹³ IAB Europe, “Transparency & Consent Framework – Policies”, Version 2019-08-21.3, <https://iabeurope.eu/wp-content/uploads/2019/08/TransparencyConsentFramework_PoliciesVersion_TCFv2-0_2019-08-21.3_FINAL-1-1.pdf>

¹¹⁴ *Ibid.*

¹¹⁵ Veale, M. and Borgesius F. Z., “Adtech and Real-Time Bidding under European Data Protection Law”, *German Law Journal* (forthcoming) (2021), at 12.

¹¹⁶ Brave, “Regulatory complaint concerning massive, web-wide data breach by Google and other “ad tech” companies under Europe’s GDPR” (12 September 2018), <<https://brave.com/adtech-data-breach-complaint>>.

¹¹⁷ Brave, “Update on GDPR complaint (RTB ad auctions)” (28 January 2019), <<https://brave.com/update-rtb-ad-auction-gdpr/>>.

stage of an advertising transaction is in compliance with the relevant provisions of the GDPR”, including “the lawful basis for processing, the principles of transparency and data minimisation as well as Google’s retention practices”.¹¹⁸ Having made the ad tech sector a priority, in June 2019, the UK’s Information Commissioner’s Office published the “Update report into ad tech and real time bidding”¹¹⁹ that sets out a number of risks and initial concerns about the processing of personal data in the context of RTB. More recently, in June 2021, the Irish Council for Civil Liberties (ICCL) has launched a lawsuit in Hamburg, Germany, against IAB TechLab, an industry trade body whose members include Google, Facebook, Amazon and Twitter. The lawsuit challenges the RTB practice for online advertising, arguing that it violates a number of GDPR’s requirements, such as data security (Article 32 GDPR), transparency and the provision of information (Articles 12 and 13 GDPR), or a legal basis (Article 6 GDPR).

The following sections (a) – (c) focus on data protection concerns that originate from the very nature of targeted online advertising: legal basis and the processing of sensitive information, transparency and the provision of information, and automated decision-making.

a. Legal basis and the processing of sensitive information

To be in compliance with the GDPR, companies processing personal data need to rely on one of the six legal basis indicated in Article 6 GDPR. The most relevant legal basis for the private sector are consent (a), the performance of a contract (b), and the legitimate interest. In the context of RTB, consent seems to be the only legal basis able to legitimise the use of data for the purpose of targeted advertising

The legal basis indicated in Article 6(b) GDPR states that data processing is lawful if ‘processing is necessary for the performance of a contract to which the data subject is party.’ In the context of RTB, it is highly unlikely that the necessity of the performance of contract could justify large-scale data processing for the purpose of tracking and delivering targeted ads. Article 29 Working Party has already stated Article 6(b) would not be “a suitable legal ground for building profiles based on users’ tastes and lifestyle choices based on his clickstream on a website and the items purchased. This is because the data controller has not been contracted to carry out profiling, but rather to deliver particular goods and services”.¹²⁰ The European Data Protection Board confirmed that data processing that finances the delivery of a service is “separate from the objective purpose of the contract between the user and the service provider, and therefore not necessary for the performance of the contract at issue”.¹²¹ Also the case-law of the EU Courts establishes that ‘[a]s regards the condition relating to the necessity of processing personal data, it should be borne in mind that derogations and limitations in relation

¹¹⁸ Reuters, “Irish regulator opens first privacy probe into Google” (22 May 2019), <<https://www.reuters.com/article/google-dataprotection/irish-regulator-opens-first-privacy-probe-into-google-idUSS8N21D027>>.

¹¹⁹ Information Commissioner’s Office, “Update report into adtech and real time bidding” (20 June 2019).

¹²⁰ Article 29 Data Protection Working Party, “Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679” (last revised and adopted on 6 February 2018).

¹²¹ European Data Protection Board, “Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of services to data subjects” (2019), at 13

to the protection of personal data must apply only in so far as is strictly necessary'.¹²² The condition of necessity must therefore be interpreted narrowly and is impossible to prove in the context of RTB.

Another legal basis that business can invoke to legitimise data processing is the legitimate interest laid down in Article 6(f) GDPR. It states that processing can be lawful if it is 'necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.' Just like the performance of a contract basis discussed above, legitimate interest is unlikely to legitimise data processing for the purpose of targeted advertising through RTB. There are three conditions that need to be satisfied under Article 6(f) GDPR: there needs to be a legitimate interest, data processing needs to be necessary to pursue such an interest, and a legitimate interests must not be overridden by the interests or fundamental rights of an individual. Even if a company argues that targeted advertising constitutes a legitimate interest, the second condition – necessity – would be difficult to prove, as online advertising can also be delivered without large scale tracing and targeting (e.g. contextual advertising). Assuming, however, that the necessity criterion is met, the third requirement – that the legitimate interest outweigh the rights and interests of individuals – is unlikely to be satisfied, as the intrusive nature of RTB presents serious risks for data protection and privacy of users.¹²³ Furthermore, Article 29 Working Party explicitly noted in Opinion 06/2014, that opt-in consent 'should be required, for example, for tracking and profiling for purposes of direct marketing, behavioural advertisement, data-brokering, location-based advertising or tracking-based digital market research'.¹²⁴

Another argument that speaks for consent as the only possible legal basis is that data included in the RTB oftentimes reveals sensitive information.¹²⁵ As Article 9 GDPR stipulates, the processing of such special categories of data revealing information such as racial or ethnic origins or political opinions is prohibited. The article lays down a number of exceptions, one of them being an explicit consent provided by an individual to the processing of such data for one

¹²² Case C-13/16, *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA "Rīgas satiksme"*, ECLI:EU:C:2017:336, para 30.

¹²³ Veale, M. and Borgesius F. Z., "Adtech and Real-Time Bidding under European Data Protection Law", *German Law Journal* (forthcoming) (2021), at 20.

¹²⁴ Article 29 Data Protection Working Party, "Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC".

¹²⁵ Some companies have taken steps to limit the processing of sensitive information. See, for example, Google, "Additional steps to safeguard user privacy" (14 November 2019), <<https://www.blog.google/products/admanager/additional-steps-safeguard-user-privacy/>>. Google announced that in order to protect user privacy, beginning in February 2020, it will no longer include contextual content categories – descriptions of the content on a website or app, such as whether the content relates to medical issues – in the bid requests that the company sends to buyers participating in Google's auctions. This change, as the company indicates, "will help avoid the risk that any participant in our auctions is able to associate individual ad identifiers with Google's contextual content categories". It will thus be impossible for advertisers to tie sensitive information related, for example, to sexual orientation or religion, to an individual user. Although this is an important first step, it also spurred criticism that the change might result in entrenching Google's position in the advertising market even further. As the value of 'third-party' data will decrease, advertisers will put more value on 'first-party' data, and Google Search is the main source of such data.

or more specified purposes (Article 9(a) GDPR), which needs to be freely given, specific, informed and unambiguous.

Although consent seems to be the only legal basis that companies could use to render data processing lawful, it is arguably not possible to obtain a GDPR compliant consent for the purpose of targeted online advertising powered by RTB. As commentators observed, the RTB system leaks users' data (e.g. what they are reading, watching and listening to) to "an unknown number of companies, who do unknowable things with it", and "[o]ne cannot seek consent for a data breach."¹²⁶ According to the UK's Information Commissioner's Office, given that the supply chain in the RTB ecosystem is opaque and complex, "organisations cannot always provide the information required, particularly as they sometimes do not know with whom the data will be shared", hence they "do not give individuals an appropriate picture of what happens to their data."¹²⁷ It is in the nature of the RTB that the first party – the one that obtains consent – cannot determine with which third parties user data will be shared in the auction process, hence it is unable to provide the complete information to the data subject. The consent to third party tracking might then not be informed and cannot be used to legitimise the practice.

b. Transparency and the provision of information

The fact that companies might not be able to properly inform users not only makes it impossible for them to obtain a GDPR compliant consent, but might also be incompatible with Articles 13 and 14 GDPR that contain the list of information to be provided to the data subject. Among such required information is for example 'the identity and the contact details of the controller', 'the purposes of the processing' and the legal basis, as well as 'the recipients or categories of recipients of the personal data, if any'. Moreover, in line with the GDPR, such information should be provided 'in a concise, transparent, intelligible and easily accessible form, using clear and plain language'.¹²⁸ As can be inferred from the very nature RTB operates – its lack of transparency, complexity, and the involvement of multiple actors, – and as others also note, current RTB practices do not comply with these transparency requirements and 'worryingly, it seems almost impossible to make RTB comply'¹²⁹ with these provisions.

c. Profiling and automated individual decision-making

The GDPR also includes safeguards against profiling that forms the basis for delivering targeted ads. Profiling is defined in Article 4 as "[a]ny form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements". In Article 22(1), the GDPR further stipulates that individuals should have the right "not to be subject to a decision based solely on automated processing, *including*

¹²⁶ Campaign, "IAB launches 2.0 version of controversial adtech standards" (21 August 2019), <<https://www.campaignlive.co.uk/article/iab-launches-20-version-controversial-adtech-standards/1594356>>.

¹²⁷ Information Commissioner's Office, at 19.

¹²⁸ Article 12 GDPR.

¹²⁹ Veale, M. and Borgesius F. Z., "Adtech and Real-Time Bidding under European Data Protection Law", *German Law Journal* (forthcoming) (2021), at 31.

profiling, which produces legal effects concerning him or her or similarly significantly affects him or her”.¹³⁰ The protections included in this article are however defined rather vaguely, leaving the room for interpretation particularly when it comes to the meaning of ‘significant effects’. According to the Article 27 Working Party, targeted advertising might produce such significant effects depending on the particular characteristics of the case: “the intrusiveness of the profiling, including the tracking of individuals across different websites, devices and services”, “the expectations and wishes of the individuals concerned”, “the way the advert is delivered”, or “using knowledge of the vulnerabilities of the data subject targeted”.¹³¹

As shown in the section above, the GDPR contains legal provisions that enforcers could use to remedy data-related failures caused by the digital advertising business model. Before drawing conclusions as to how competition and data protection converge and interact in this context, the subsequent section 4.2 focuses on the second phase – information distribution. It specifically delves into how the two areas of law could be used to address market distortions related to traffic referral, traffic allocation and news personalisation.

4.2. Information distribution: traffic referral, allocation, and personalisation of news

The trend of platformisation of news distribution is solidifying the vertical interdependence between news publishers and digital platforms, which over the past years have become complements just as distributors of goods are complements to manufacturers. While the content produced by news publishers is an essential input for digital platforms, the former should in theory also benefit from the relationship by obtaining referrals from powerful tech platforms.¹³² Yet, due to power asymmetries, this is not always the case.

First, platforms seem to profit more from the interdependency by engaging in ‘free-riding’ on the content generated by publishers. For this to happen, as suggested by Geradin, two conditions need to be present: i) platforms benefit from the traffic flowing and ii) news publishers, the ‘destination’ and cause of the traffic, are prevented from or hindered in monetising the traffic.¹³³ As observed by Hubbard, “Google and Facebook both have incentives to keep users within their digital walls, engaging with content on the Facebook platform or on Google search pages, web properties and apps, rather than on news publishers’ properties”.¹³⁴ As it is platforms’ business interest to maintain readers within their ecosystems (i.e. in order to extract their data and sell detailed profiles to advertisers), market practices aimed at diverting traffic away from publishers merit attention, given in particular asymmetrical power relations between platforms and publishers.

Second, given platforms’ discretion to curate the news, select them, and allocate traffic, news publishers have no longer control over how the news produced by them are ranked,

¹³⁰ Article 22(1) GDPR, emphasis added.

¹³¹ Article 29 Data Protection Working Party, “Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC”.

¹³² Geradin, D., “Complements and/or substitutes? The competitive dynamics between news publishers and digital platforms and what it means for competition policy”, *TILEC Discussion Paper No. 2019-003* (2019).

¹³³ *Ibid.*, at 10. Hindered opportunities to monetise the traffic can, for example, be the result of readers’ only skimming headlines without clicking through the news story. According to Cairncross Review, 42% of adults admit doing so. See The Cairncross Review, “A Sustainable Future for Journalism” (2019).

¹³⁴ Hubbard, S., “Fake News is a Real Antitrust Problem”, *CPI Antitrust Chronicle December* (2017).

displayed, or which personalised content the readers get to see. Personalisation is not a problem per se: it might even become a tool in the administration of online information flow and one way to help users organise the processing of news.¹³⁵ On the other hand, however, content personalisation implies that users' epistemic welfare might be negatively affected as they inescapably end up exposed only to selected views, information or media outlets.¹³⁶ Furthermore, power imbalances allow platforms to exploit news publishers' dependency on them in a way that furthers commercial interests of the former to the detriment of the latter.¹³⁷ For example, the report on online advertising by the UK's Competition and Markets Authority noted that in the UK Google and Facebook provide almost 40% of the traffic to large publishers, and that there are "concerns about unexpected changes to the Google Search and Facebook News Feed algorithms that have resulted in dramatic reductions in traffic to certain newspapers overnight".¹³⁸ The sections below explore how concerns related to power of platforms over traffic referral and distribution, and well as news personalisation, can be addressed under the rules of EU competition and data protection.

4.2.1. Competition in the information distribution phase

a. Free-riding and limited traffic referrals

The problems of free-riding and limited traffic referrals in the media industry resurfaced in the context of the copyright reform in Europe. Article 15 of the EU Copyright Directive – labelled by some as the 'link tax' – was introduced to ensure that platforms remunerate publishers when they display their content online.¹³⁹ The premise underlying the law is that readers may not be incentivised to click through to the publisher's page once they have gotten the gist of an article from Google, for example, which harms publishers as it results in devaluing their advertising space. As the Directive explains, boosting publishers' ability to recoup investments is essential to "ensure the sustainability of the publishing industry and thereby foster the availability of reliable information".¹⁴⁰

Although the objective of supporting valuable media is sound, many commentators expressed doubts regarding the right's ability to effectively protect publishers. Before the adoption of the Directive, scholars had noted that "there is no indication whatsoever that the proposed right will produce the positive results it is supposed to", adding that "considering

¹³⁵ Graber, C.B., "Technology, Law and Digital Freedoms", *i-call Working Paper Series No. 2016/01* (2016), at 4.

¹³⁶ See also Sunstein, C., *Republic.com 2.0* (Princeton: Princeton University Press, 2007). Sunstein expressed that personalisation might risk creating "echo chambers", fragmentation (i.e. "enclaves of like-minded"), and is ultimately dangerous for deliberative processes in democratic societies.

¹³⁷ See News Corp, "Comments of News Corp to the European Commission" (2018), at 3. News Corp observed that "[i]nstead of acting as a neutral intermediary to source the most relevant and reliable news content, digital platforms can and do allocate traffic in a way that suits their commercial interests to the detriment of (some categories) of publishers."

¹³⁸ CMA, "Online platforms and digital advertising. Market study final report" (1 July 2020), at 17.

¹³⁹ Directive, Article 15: "Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances."

¹⁴⁰ Directive (EU) 2019/790 ('EU Copyright Directive') [2019] OJ L130, para 55.

current high levels of market concentration on online advertising markets and in media, a publishers' right may well backfire: further strengthening the power of media conglomerates and of global platforms to the detriment of small players".¹⁴¹ Given that there is no sound economic case for introducing the right, it will most likely harm journalists, exacerbate power asymmetries and fail to remedy the fundamental problems that the media industry is facing.

The implementation of the Directive makes evident that the concerns described above were justified. Google announced that in France, the first Member State that transposed the EU Copyright Directive into national law in 2019, it will not offer payments to press publishers for displaying snippets and, by default, will start showing only a headline and a bare link to the content in question to its French users.¹⁴² Publishers will still have the choice to request the publishing of previews, but Google will not remunerate them for this. As Richard Gringras, vice president for news at Google, indicated in a blogpost: "[w]e don't accept payment from anyone to be included in search results. We sell ads, not search results, and every ad on Google is clearly marked. That's also why we don't pay publishers when people click on their links in a search result".¹⁴³ Instead of benefitting from the legal novelty in terms of gaining bargaining power, the publishers risk losing their visibility and advertising revenues. This is precisely what happened in the past in Germany, where following the German 'ancillary copyright' law in 2013, Google stopped publishing snippets and the German publishers' traffic shrank considerably.¹⁴⁴ Thus, the new right laid down in EU copyright law will most likely be ineffective in addressing power asymmetries in the media context in a long run.

An alternative route to remedy the problem of free-riding might be the enforcement of competition law. Platforms' status as essential sources of traffic and, in fact, unavoidable trading partners, lays the ground for exclusion or even exploitation claims under Article 102 TFEU. Appropriating original content without fair compensation might have the effect of suppressing innovation:¹⁴⁵ "limiting production, markets or technical development to the prejudice of consumers", indicated as problematic under Article 102(b) TFEU. In other words, by harming news publishers' ability to produce quality content, platforms might act as innovation bottlenecks hampering the development of innovative products. Arguably, a case could be made that online platforms have become an essential facility for news publishers and access to such platforms – being listed in search results, for example – is necessary for publishers to reach customers and effectively compete. Denying access to a dominant platform might then be considered an abuse of power by that platform under Article 102 TFEU. The use

¹⁴¹ "Academics Against Press Publishers' Rights" (2018), <<https://www.ivir.nl/academics-against-press-publishers-right/>>.

¹⁴² See, for example, Politico, "Google refuses to pay publishers in France", <<https://www.politico.eu/article/licensing-agreements-with-press-publishers-france-google/>>.

¹⁴³ See Google, "How Google invests in news" (25 September 2019), <<https://www.blog.google/perspectives/richard-gingras/how-google-invests-news/>>.

¹⁴⁴ See, for example, Reuters, "Germany's top publisher bows to Google in news licensing row" (5 November 2014), <<https://www.reuters.com/article/us-google-axel-sprngr/germanys-top-publisher-bows-to-google-in-news-licensing-row-idUSKBN0IP1YT20141105>>.

¹⁴⁵ Geradin, D., "What should EU competition policy do to address the concerns raised by the Digital Platforms' market power?", *SSRN* (2018), <https://ec.europa.eu/competition/information/digitisation_2018/contributions/damien_geradin.pdf>, at 7.

of an essential facilities doctrine would help to make sure that platforms do not escape competition enforcement by refusing to publish snippets altogether.

Platforms that take advantage of publishers by imposing ‘unfair prices or unfair trading conditions’ in line with Article 102(a) TFEU could also be accused of illegally exploiting publishers. Arguably, authorities could refer to the wording of Article 15 of the EU Copyright Directive to determine whether the terms on which platforms give access to their services are exploitative and unfairly harm publishers, having negative repercussions for final consumers. This, however, may in practice prove difficult given broadly defined benchmarks in the Directive: remuneration needs to be appropriate and proportionate as “compared to the subsequent relevant revenues and benefits derived from the exploitation of the works and performances”.¹⁴⁶ Furthermore, to run a successful exploitation case, authorities would need to submit an evidence of a link between exploitation and market power, i.e. to prove that free-riding would not materialise in a competitive market.¹⁴⁷

b. Exploiting individuals’ ‘willingness to engage’

The power over traffic can also take the form of allocating it in a way that only some publishers’ output is made available to the readers or more prominently displayed and ranked. Personalisation is one criterion that can be used by platforms to make such selection. Although personalisation could be detrimental to online readers in an epistemic sense as it might prevent them from “developing modes of thought and action unlike those with which they are already familiar”, some users might find personalised content satisfying. Detrimental effects might be more substantial when such content is selected by platforms arbitrarily, with the sole aim of maximising engagement that might result in promoting poor quality sources and sensationalist content.¹⁴⁸ Just like with personalised prices based on individuals’ willingness to pay, powerful online companies might exploit users’ ‘willingness to engage’ to extract as much user attention as possible. If employed by dominant players, and depending on specific circumstances, the practice might exploit individuals and deemed problematic under Article 102(a) TFEU. This can occur, for example, when platforms select the content in a way that does not promote trustworthy, relevant and varied sources, but rather makes prominent a small number of outlets of questionable quality, offering limited benefits to consumer and at the same time profiting from data collection on the platform. Beyond exploiting individuals and incurring direct harm,

¹⁴⁶ Article 15, EU Copyright Directive.

¹⁴⁷ Beyond free-riding on quality content, platforms might disrupt traffic referrals also in other ways. An example demonstrating tech companies’ power over news distribution is a much-debated Google’s First-Click-Free policy, forcing publishers to provide nonsubscribers free access to news articles via search results or otherwise risking having their content not indexed altogether. The example of the Wall Street Journal is indicative of the gravity of impacts Google’s policy might have on publishers: as a result of pulling out of the program, traffic to wsj.com from Google fell 38% and referrals from Google News were down 89% as compared with a year before. Although the policy is now scraped and replaced by ‘Flexible Sampling’, it is indicative of platforms’ possibilities to exploit their status of unavoidable trading partners.

¹⁴⁸ See News Corp, *supra* note 674, at 3. News Corp observed that “Internet traffic should be allocated neutrally and transparently by digital platforms so that Internet users seeking news content are, consistent with their reasonable expectations, directed to the most relevant and reliable news content”.

personalisation aimed at maximising engagement could at the same time lead to the exclusion of worthy news publishers who compete with platforms for users' attention.

c. Collective bargaining

Faced with asymmetrical power of platforms, publishers may need to embark on other tactics to stay competitive. A strategy that might strengthen the position of publishers is collective bargaining.

Although potentially effective, collectively negotiated remuneration agreements and policies that facilitate such negotiations might however raise important challenges in relation to competition law. To be compatible with competition law, bargaining would need to be set in a way that the benefits it generates to consumers outweigh the loss of competition or consumer benefits from accessing online platforms.¹⁴⁹

4.2.2. Data protection in the information distribution phase

a. Data collection and processing for the purpose of profiling and content personalisation

Data-based profiling enables compartmentalisation of societies based on their personal tastes, interests and psychological traits, and the subsequent personalisation of online experiences and information exposure.¹⁵⁰ From a data protection standpoint, personalising the content to match users' assumed interests might in certain circumstances constitute a concern under the GDPR. Such concerns can arise in relation to identifying a lawful legal basis and legitimate purpose, as well as the way in which profiling forms the basis for personalisation of services.

First, to be GDPR compliant, platforms that act as *de facto* shapers of the media ecosystem by ranking or selecting news according to users' tastes and interests need to rely on a lawful legal basis as stipulated in Article 6 GDPR. Commenting on the issue, the European Data Protection Board focused specifically on the question whether Article 6(1)(b) GDPR – the performance of a contract – could serve as a valid basis ensuring lawfulness of processing. It indicated that personalisation *may* constitute “an intrinsic and expected element of certain online services” and therefore *may* be considered necessary for the performance of a contract in certain cases.¹⁵¹ This, however, depends on “the nature of the service provided, the expectations of the average data subject in light not only of the terms of service but also the way the service is promoted to users, and whether the service can be provided without personalisation”.¹⁵² Yet, personalisation of content is oftentimes not objectively necessary for the purpose of the contract. One example provided by the EDPB is where “personalised content delivery is intended to increase user engagement with a service but is not an integral part of

¹⁴⁹ Oxera, “An era of negotiation: news publishers and online intermediaries” (2016), <<https://www.oxera.com/agenda/an-era-of-negotiation-news-publishers-and-online-intermediaries/>>.

¹⁵⁰ Privacy International, “Data Is Power: Profiling and Automated Decision-Making in GDPR” (2017), at 6.

¹⁵¹ European Data Protection Board, “Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of services to data subjects” (2019), at 15.

¹⁵² *Ibid.*

using the service”,¹⁵³ in which case data controllers need to use an alternative legal basis. Thus, businesses offering personalisation that are primarily motivated by boosting user engagement need to rely on another legal basis – lawful consent appearing as the only alternative.

Besides finding an appropriate legal basis, data controllers also need to make sure that they comply with the principle of purpose limitation enshrined in Article 5(b) GDPR. As the article stipulates, the purpose for which data are collected must be specified, explicit and legitimate. As such, however, the purpose of personalisation that can be defined as maximising user engagement – which in fact implies the exploitation of their ‘willingness to engage’, as mentioned in the analysis of competition enforcement – does not however seem legitimate enough to justify data collection.

As indicated in section 4.1.2(c), the GDPR also includes safeguards against profiling that forms the basis of automated decision-making, related for example to what personalised media content users are exposed to. As also mentioned, the wording of Article 22 is not very precise when it comes the meaning of ‘significant effects’. It could be argued that in the case of personalisation of the information ecosystem based on user profiling, such significant effects arise when individuals’ epistemic welfare is considerably affected, i.e. when as a result of personalisation, individuals have a significantly limited exposure to a variety of reliable media content. In addition, the process of profiling as such might be erroneous and lead to misclassifying or misidentifying individuals, which in turn could lead to flawed decisions that significantly affect them in line with Article 22 GDPR.

5. Conclusions: coherence through the value of epistemic welfare

This article aimed to analyse whether and how EU competition law and data protection law can coherently protect epistemic welfare of individuals in the online information marketplace. Specifically, the article focused on the empirical context related to two interlinked phases of the information cycle: information production and information distribution. In the first phase, the main challenge that negatively affects publishers and might ultimately harm individuals relates to the online behavioural advertising business model as such. In the second phase, what could prove problematic is ‘platformisation’ of news distribution, and more specifically traffic referral, allocation, and news personalisation by online platforms. The two following sections explain how EU competition and data protection can provide coherent responses to the identified concerns.

5.1. Information production stage

Competition for digital ad revenues continues to fuel the online business model based on the collection of massive amounts of personal data, leaving publishers far behind in this horizontal race. As shown in the analysis, both competition and data protection authorities could use their enforcement powers to commonly address distortions and power abuses by platforms in order to boost individuals’ epistemic well-being in the information market.

As regards the GDPR, its enforcement can result in companies being obliged to rethink their approach to data collection and processing for the purpose of online targeted advertising.

¹⁵³ *Ibid.*

For example, data protection authorities might consider consent an invalid legal basis for the purpose of RTB under Article 6 GDPR, as well as prevent companies from employing digital advertising if they cannot provide individuals with the complete information about data processing – i.e. who are the recipients of data – under Article 13 and Article 14 GDPR. This does not mean, however, that there is an inherent incompatibility between ad-targeting and data protection.¹⁵⁴ Given that the advertising business model benefits users in that it allows them to access content free of charge, it is important to consider other digital advertising infrastructures that could be implemented without compromising users' privacy and competitive dynamics. One alternative that might be set to play a more prominent role is contextual advertising, an original form of targeting that entails the display of relevant ads according to the content viewed by consumers, rather than based on their personal characteristics. Data protection could hence give online companies a necessary push to switch to business models that do not rely on personal data exploitation, privacy-preserving contextual advertising being a prominent example.

Although driven by a partially different rationale, the enforcement of competition law Article 102(b) TFEU could achieve a similar outcome. One example where competition rules could be used to address concerns around data harvesting and the resulting exclusion of publishers is 'platform envelopment', a market strategy aimed at amassing various types of data. As illustrated above, in a market prone to tipping and when firms force users to consent to merging datasets from across platforms without offering considerable benefits, market envelopment that leads to data consolidation could prove to generate anticompetitive exclusionary effects under Article 102(b) TFEU. This would imply convergence with data protection provisions as it would stimulate the development of other business models that do not have the collection of personal data from various sources at its core. At the same time, competition enforcement could be prompted by a refusal to share the data with news publishers for the purpose of providing targeted advertising, which, in turn, could be remedied by requiring such access under specific conditions. To achieve coherence with data protection provisions, competition enforcers would need to closely cooperate on designing conditions fully compliant with the GDPR.

As shown, the underlying intervention logic in these fields would partially differ: whereas competition's concern under Article 102 TFEU can be framed as publishers' lack of access to data for the purpose of targeted advertising and their resulting exclusion, data protection intervention would focus on ensuring that in the context of online advertising, personal information is processed in a way that protects users' privacy. Despite this divergence, the two areas demonstrate coherence as their enforcement would result in approaching the issue of the business model in a corresponding way, commonly and implicitly protecting the value of epistemic welfare.

¹⁵⁴ Toubiana, V. et al., "Adnostic: Privacy Preserving Targeted Advertising", *Proceedings of the Network and Distributed System Security Symposium, NDSS (2010)*, <<https://crypto.stanford.edu/adnostic/adnostic.pdf>>.

5.2. Information distribution stage

Online platforms shape the online information market by using their power over traffic referral, allocation, and personalisation of the information environment, not infrequently exploiting the existing dependencies and power asymmetries between them and news publishers.

As regards the problem of limited traffic referrals, competition authorities could apply competition law to address distortions and rebalance the existing power dynamics. Competitive distortions that might merit more attention under Article 102 TFEU relate in particular to refusals by online platforms to list news publishers' previews and compensating them in a proportionate and appropriate way, as also stipulated in the EU Copyright Directive. Mitigating power imbalances is essential to prevent platforms' free-riding on the content created by news publishers. As the problem of traffic referral does not necessarily involve privacy-related issues, no interactions between data protection and competition can be envisaged in this context.

Competition and data protection could, however, be considered as providing a coherent solution to another practice in the information distribution phase that in certain cases might prove problematic, namely traffic allocation. In the information marketplace, platforms might use their market power to harm consumers' epistemic well-being by personalising content in a way that serves the sole purpose of maximising user engagement, disregarding how trustworthy and varied the provided content is. As the traffic is thereby allocated arbitrarily, the main benefiting party are the platforms themselves, who profit from user engagement by collecting their data and selling personal profiles to advertisers.

Both competition and data protection law could be invoked to make platforms allocate the traffic in a way that ensures that competition is not stifled and the most reliable and relevant news sources get the chance to win in the market, ultimately benefitting the epistemic welfare of individuals. The GDPR could achieve this objective by making it more difficult for companies to offer personalised content if personalisation is not necessary for the provision of a service, but rather has the purpose of exploiting individuals' willingness to engage with the service. As the analysis suggested, such personalisation could not be based on 6(1)(b) GDPR – the performance of a contract – hence companies would need to rely on another legal basis. Also Article 22(1) GDPR could make it legally challenging for companies to embark on profiling that significantly affects users, arguably by exposing them to a tailored information environment where quality and variety do not determine the content displayed. Ultimately, the GDPR enforcement could lead to limited personalisation and tailoring of the information ecosystem. Competition law enforcement could result in the same outcome, ensuring that dominant platforms do not exploit users' 'willingness to engage' with the service while pursuing the sole purpose of extracting their attention, which might be considered incompatible with Article 102(a) TFEU.

The analysis of competition and data protection through epistemic welfare – the value that was assumed to be protected *implicitly* in empirical contexts of the information production and distribution online – demonstrated that the two areas display a significant level of coherence, with the end result of providing common approaches to the selected practices in the online information market.